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JUN 29 1992

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
AMENDMENT OF PARTS 1,2, AND)
21 OF THE COMMISSION'S RULES)
GOVERNING USE OF THE FREQUENCIES)
IN THE 2.1 AND 2.5 GHZ BANDS)

PR DOCKET NO. 92-80
RM 7909

ORIGINAL
FILE

COMMENTS OF UNITED STATES INTERACTIVE
and MICROWAVE TELEVISION ASSOCIATION
(USIMTA)

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SUMMARY

There is one worthwhile proposal in this rulemaking and that is to transfer the regulation and processing of MDS to the Mass Media Bureau. The rest of the Commission's proposals are contrary to the public interest, unlawfully retroactive, and most egregious of all, totally unnecessary to eliminate immediately the Commission's large backlog of MDS applications.

USIMTA believes that the MDS backlog can be eliminated virtually overnight simply by reversing two serious mistakes the Commission has made in its handling of MDS heretofore and returning to basic principles of the regulatory process.

First, in MDS the Commission has failed to follow its own long established and sound "past performance" policy, namely, that an applicant who has defaulted under one license is disqualified to receive a second. A corollary is that an applicant is not eligible for a second license until he has constructed and is in operation under the first license awarded to him. It is USIMTA's understanding that the Commission routinely has chosen the same 1983 applicants for MDS licenses in as many as 15 or 20 markets without imposing any requirement that the applicant construct and put into operation a system even in the first market won. The staff's long nightmare with the 1983 MDS applications is a result of the Commission's failure to follow these fundamental principles of regulation in the public interest. Applying them now may well enable the Commission to dismiss summarily many if not most of the still pending 1983 applications.

The Commission's second serious mistake is that in its MDS lottery scheme it has prohibited settlements until after all the applications in a market have been "accepted for filing", which means processed by the staff. This is contrary to the Commission's own rules which permit MDS settlements at any time after an application has been filed. (See Sec. 21.29, 21.33(b)).

The Commission can very likely achieve the immediate voluntary dismissal of well over 90% of the thousands of pending Same Day Rule applications (November 1, 1990 to the April 9, 1992 freeze) and a great number of those filed from 1988 to 1990, simply by permitting a standard form pre-acceptance-for-filing settlement in accordance with its existing rules.

For example, under the Same Day Rule there may be 20 MDS applications that were filed on the same day for East Overshoe. The Commission should simply announce that it will permit applicants to enter into pre-acceptance-for-filing settlements in the following form:

1. All the applicants but one voluntarily dismiss their applications with prejudice and so certify in writing.
2. The only consideration to be received by any dismissing applicant is a pro rata share in the single remaining applicant. No cash is to change hands.
3. The single surviving application shall be amended within 30 days to show its new ownership structure.

4. The Commission shall process the single surviving application expeditiously, as if East Overshoe had been a single applicant market from the date of filing.
5. If the single surviving application is acceptable it shall be granted a conditional license, if not it shall be denied or dismissed and the applicant shall have the same rights of appeal as any other applicant.

It is highly likely that 19 of the 20 pending applicants in East Overshoe voluntarily will dismiss their individual applications immediately, and that the Commission will have to accept for filing only one of the 20 applications received in that market.

Under its present MDS lottery procedures the Commission prohibits the applicants from entering into such a settlement until after its staff has accepted for filing all 20 applications, at which time the parties can voluntarily dismiss 19 of them, but there is no basis for this prohibition in the Commission's Rules. Demonstrably, if 19 of the 20 applicants in East Overshoe are willing to dismiss their applications prior to acceptance, 95% of the staff's work accepting applications serves no purpose.

There is nothing wrong with the Commission's present MDS settlement rules. Among other benefits they help avoid backlogs. The problem is that the Commission has not followed its own rules. Had it done so there might be no backlog today.

Paradoxically, instead of removing this unauthorized roadblock to expeditious handling of MDS applications, the Commission in this rulemaking is proposing to change its rules to

bar all settlements in MDS and apply the ban to pending as well as future applications! That way the staff will not only have to accept for filing all 20 applications in East Overshoe, it will also have to conduct a lottery in that market, because even after acceptance the parties will not be permitted to settle the matter among themselves. Manifestly, rather than reduce the backlog, the Commission's solution will make it worse!

The barring of settlements is just one of the ill-advised ways the Commission is proposing to reduce its backlog of pending MDS applications in this rulemaking. The principal method is to bar MDS service for East Overshoe entirely, on the arbitrary ground that it is not 50 miles away from an existing or proposed co-channel system, even though the MDS system in East Overshoe will not cause harmful interference to any other MDS system. MDS service to East Overshoe is to be sacrificed on the altar of FCC application processing.

The rule changes proposed by the Commission in this proceeding are ill advised, contrary to the public interest, unlawfully retroactive, and not necessary to reduce the backlog of MDS applications. They should not be adopted. In their place the Commission should adopt the two changes in its MDS practices proposed by USIMTA. These changes are consistent with the Commission's established policies and present rules and will eliminate the MDS backlog in short order - without eliminating MDS service to the public.

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COMMENTS OF UNITED STATES INTERACTIVE and
MICROWAVE TELEVISION ASSOCIATION (USIMTA)

United States Interactive and Microwave Television Association (USIMTA) hereby submits its comments in the above captioned rulemaking proceeding relating to the processing of applications in the Multipoint Distribution Service (MDS) in response to the Commission's Notice Of Proposed Rulemaking released May 8, 1992 (FCC 92-173), (the "Notice"). For purposes of convenience we shall address the various issues raised in the order they are presented by the Commission in the Notice.

A. Relocating MDS Processing. (Notice Para. 6)

1. The Commission should transfer the regulation of MDS to the Mass Media Bureau (MMB). The usage of MDS has evolved from common carrier services into almost exclusively wireless cable, a mass media service. ITFS, a related service with which MDS interacts extensively, is already regulated by the MMB. In addition, the MMB can be expected to have a greater sensitivity than either the Common Carrier Bureau (CCB) or the Private Radio Bureau (PRB) to peculiarly mass media issues such as those involving the First Amendment.

2. If the Mass Media Bureau has the capacity to process MDS applications the processing should be transferred to Mass Media as well. Two closely related functions such as processing and regulating the same application should not be separated, either organizationally or geographically, if that can be avoided. Only if the MMB does not have the capacity to process MDS applications should part of the processing be done by one of the other bureaus. If the choice is between the CCB and the PRB in Gettysburg, the convenience of the co-location of the CCB and the MMB in Washington would seem to outweigh the PRB's experience in processing similar applications in Gettysburg. The learning curve for processing MDS applications should be relatively steep and short, but Gettysburg is never going to get any closer.

3. We do not agree with the suggestion that it would be appropriate to classify MDS as a wholly private radio service. The Commission is going to great lengths to make wireless cable a viable competitor to conventional cable, which is unquestionably a mass media service. If wireless succeeds it will be because it is able to bring cable type television programming to a significant portion of the general public, that is, function as a mass media service. If it fails it will be because it never became anything but a private radio service for a relatively few people. At that point the Commission can again address the interesting theoretical question whether MDS does not resemble a private radio service.

B. Interference, Separations or MSA/RSA. (Notice Para. 12)

4. Changing from interference standards to separation standards or to an MSA/RSA licensing format for MDS would be contrary to the public interest and an affront to the public. It is far too late in the day for the Commission to even consider such a change. On one hand the Commission indicates that virtually every market in the country has already been applied for, and that very few additional applications will be viable, and on the other hand it talks about totally changing the basis on which it awards MDS licenses. For what purpose? The Commission's own administrative convenience. That is hardly a sufficient ground for a change of such magnitude.

5. Does the Commission have any conception at all of how much money the public has already spent to comply with its present MDS requirements? If some insoluble technical problem had arisen which prevented MDS from working as intended, there might be some justification for the Commission to consider abandoning the interference standards on which the thousands of MDS applications already filed were based. But to abandon them simply because the Commission has not been capable of processing the applications filed would be irresponsible and a disservice to the public.

6. The MDS problem the Commission is addressing in this proceeding is a backlog of applications, an administrative matter. The problem is not that MDS systems are interfering with one another, or some other technical matter which would call for

a technical solution. There is no technical problem in MDS. To put the matter in the vernacular, with respect to the technical side of MDS: "If it's not broke, don't fix it".

7. Changing to separation standards or an MSA/RSA licensing format would also be contrary to the public interest because it would reduce the number of communities that would be served by MDS. If an applicant has demonstrated that an MDS system can be installed in a community without causing undue interference to other MDS systems, it would be wrong to dismiss that application and deny that community MDS service merely because the proposed system violates an arbitrary separation standard imposed after the fact by the Commission.

8. It would be particularly offensive to dismiss a non-interfering application when the real purpose of the separation standard is simply to enable the Commission to avoid having to review the interference study. In the final analysis, isn't that why the FCC exists? Wasn't the FCC created to deal with interference questions? Do we need a Federal Communications Commission if all it is going to do is draw lines on a map to avoid addressing frequency interference questions? Couldn't that be done in someone's basement and save the taxpayers a lot of money?

9. There is also no basis for the Commission to apply new separation standards, or other new rules such as the proposed bar to settlements, retroactively to pending applications. The Commission relies on United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) for the proposition that it would be permitted to

apply the new separation standards to previously filed applications (Notice Para. 12, fn 25), but we question whether Storer supports the Commission's position.

10. In Storer the Supreme Court upheld the Commission's then new multiple ownership rules, but it did not expressly address the question of applying those rules retroactively, i.e., to a pending application. That may be because the question of retroactive application apparently was not before the Court. It is true that Storer had pending an application to acquire a sixth station, and that the Commission denied that application at the same time it issued the new regulations limiting a single owner to five stations. However, in his dissenting opinion Justice Harlan makes the following statement:

"In assessing the character of Storer's grievance, we must put aside the Commission's order, made simultaneously with its promulgation of the challenged regulations, which denied a pending application by Storer for a sixth television license. That order was reviewable only by a direct appeal within 30 days under 47 U.S.C. [Section] 402(b), (c), (citation omitted) and became final and conclusive upon Storer's failure to appeal from it. Since that order cannot be reviewed, and no relief from it may be granted in this proceeding, it is only of the prospective effect of the regulations, not their past application, that Storer may complain." 351 U.S. 192, 208.

Thus it does not appear that the question of applying a new rule to a pending application was before the Court in Storer.

11. The majority opinion in Storer is not a model of clarity and it does make passing reference to the pending application, although the question of retroactive application of the new rule is not discussed. We seriously doubt, however, that Storer will

prevail over the more recent case of Bowen v Georgetown University Hospital, 488 U.S. 204 (1988), where the Court did directly address the question of retroactivity in rulemaking and stated:

"Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. (Citations omitted.) By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. (Citations omitted.) Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."
488 U.S. 204, 208.

There is no express statutory grant of authority for retroactive rulemaking by the Commission in the Communications Act.

12. In addition, by definition in the Administrative Procedure Act, 5 U.S.C. Section 551(4), a rule "means the whole or part of an agency statement of general or partial applicability and future effect...". As products of a notice and comment rulemaking proceeding under the APA, new separation standards and new settlement rules cannot be given retroactive effect. See the Bowen case in the D.C. Circuit, Georgetown University Hospital v. Bowen, 821 F. 2d 750, 756 (D.C. Cir. 1987), and the extended discussion of this point in the concurring opinion of Justice Scalia in the Supreme Court decision, 488 U.S. 204, 216.

13. There is no basis in law for retroactive rulemaking, so the Commission cannot dispose of its backlog of MDS applications simply by changing its rules and then dismissing applications filed previously on the ground that they do not comply with the

new rules. Under the circumstances we respectfully suggest that the Commission would be better off abandoning its ill advised rulemaking and adopting USIMTA's proposals to eliminate the backlog in ways consistent with the Commission's existing rules and policies.

C. Qualification Requirements. (Notice para.16)

14. USIMTA does not agree that qualification requirements should be relaxed or reduced. On the contrary, we believe a new MDS qualification requirement needs to be added by the Commission, namely, that an applicant not have defaulted under a previous MDS license issued to him or her.

15. It is a long established and sound policy of the Commission in the broadcast area that the best indication of what an applicant's future performance as a licensee will be is his past performance as a licensee. In any service the public interest would seem to require that if an applicant has defaulted under a previous Commission license he or she should be disqualified to be a licensee in the future. Applying this "Past Performance" policy to MDS, the Commission should summarily dismiss all pending applications of any party who has been granted an MDS license in the past but has forfeited the license rather than construct and operate the station.

16. Only the Commission knows for sure, but USIMTA believes that many of the pending applicants from 1983 may have previously forfeited licenses in other markets. To reduce its backlog the Commission has a right to and should dismiss any pending applica-

tions of any party who has been awarded a conditional license in the past, and thus has already had a chance to construct and operate a system, but has not done so.

17. By the same token, once an applicant wins a lottery he or she should not be eligible to participate in a second lottery unless and until he or she receives a conditional license, constructs the system and operates it for a reasonable period. It is our understanding that the Commission has selected many 1983 applicants as the winners in multiple lotteries without requiring them first to construct and put into operation a single MDS system. No applicant should be a tentative selectee in more than one market at a time. The present practice is not in the Commission's interest or in the public interest.

D. Interim Measures. (Notice para. 18)

18. Whether the Commission adopts its own new rules or USIMTA's proposals, a period for applicants to amend their applications following the freeze will be needed, but the 14 days proposed by the Commission (Notice, Para. 20) is totally inadequate. If USIMTA's standard form pre-acceptance-for-filing settlement proposal is adopted there will have to be at least 30 days to enable all parties to be contacted and the documents to be prepared, signed and filed. Since the Commission's new separations rule would require many applicants to find new transmitter sites or risk the loss of their applications, the adoption of that rule would have to include an amendment period of at least 60 or 90 days.

E. Settlements. (Notice Para. 17, 21)

19. The Commission, at the suggestion of the Wireless Cable Association (WCA), proposes to bar all settlements and cumulative chances and to apply the ban to pending as well as future applications. The purpose of the ban is supposedly to deter the filing of speculative applications.

20. We have shown in the Summary at the start of these comments that barring settlements under the Same Day Rule merely serves to deprive the Commission itself of the significant benefits that could be derived from full market settlements. Barring settlements is also not likely to deter the filing of MDS applications by the public, any more than barring settlements in rural cellular deterred the filing of applications there.

21. From the Commission's point of view barring settlements under the Same Day Rule does not make sense. Almost invariably all the applications in a market are prepared by the same application preparer, who thanks to the Same Day Rule is able to offer customers an exclusive opportunity to apply for a single market. Under those circumstances there is a very good chance that if a settlement is permitted there will be a full market settlement. Full market settlements offer the Commission a way of avoiding the necessity of processing multiple applications in virtually every market. Barring settlements means that the Commission will have no choice but to process every application and conduct a lottery in every market in which multiple applications are filed.

22. If the Commission bars settlements it will be betting everything on the WCA's theory that such a move will deter the filing of multiple applications under the Same Day Rule. The WCA's success rate at such predictions is not very good. It sold the Same Day Rule to the Commission on exactly the same theory two years ago and look where that got us - to this proceeding.

23. USIMTA has a suggestion to make for the future. First, the Commission should discontinue the Same Day Rule and, with modifications, go back to giving the public notice of the filing of all MDS applications and a reasonable opportunity to compete for the license in a lottery. The Commission should put the responsibility for giving notice on the first applicant, who should be required to publish a notice in the community applied for and also deliver to the Commission with his application a form notice to be issued by the Commission. The window for competing applications should be 60 days from publication of the form notice by the Commission.

24. The Commission should adopt a "letter perfect" application format for MDS comparable to that used in cellular, with a cover sheet containing only the minimum essential information about the application. The cover sheet should be made available to the public for inspection but the application and any interference study should not. At the end of the 60 day window the Commission should prepare a lottery list from the cover sheets on all applications received, conduct a lottery and announce the win-

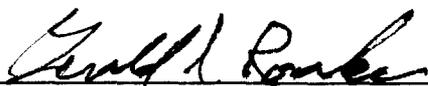
ner. The Commission should then process only the application of the winner and, if it is acceptable issue a conditional license to the winner. If the application is not acceptable it should be rejected and further lotteries held among the applicants who filed during the 60 day window until a grantable application is found.

CONCLUSION

The Commission should transfer the regulation and, if feasible, the processing of MDS to the Mass Media Bureau, but it should not adopt any of the other proposals in this rulemaking proceeding. Instead, it should eliminate the backlog of MDS applications by adopting the following suggestions: a past performance test should be applied to all pending 1983 applications, dismissing all applications of any party who has forfeited an MDS conditional license, and leaving each applicant with no more than one market in which he or she is the lottery winner or conditional licensee. Partial settlements should be permitted in all markets in which applications were filed from 1988 to October 31, 1990, and full market settlements should be permitted in all Same Day Rule markets.

Respectfully submitted,

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